

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 223 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE D.G.KARIA sd/-

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements? yes
  2. To be referred to the Reporter or not?
  3. Whether Their Lordships wish to see the fair copy of the judgement?
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge?  
2 to 5 No`
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HEMKUNVAR RAVJI

Versus

BHUPATSING JIVABHAI BARAD DECD.THRO'HEIRS

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Appearance:

MR CC KAMDAR for Petitioners  
MR SURESH M SHAH for Respondent No.1/1 to 1/3.  
Mr.Mehul S.Shah, for respondent No.3.  
Respondent No.2 served.

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CORAM : MR.JUSTICE D.G.KARIA

Date of decision:27/11/97

C.A.V. JUDGEMENT

By this revision application under section 115 of the Code of Civil Procedure, 1908, the petitioners have questioned the legality and validity of the judgment and order dated October 30,1996 passed by the learned 3rd

Extra Assistant Judge, Gondal, dismissing the appeal of the petitioners herein. The learned Judge of the appellate Court, by the impugned judgment and order, confirmed the order dated 31.1.1984 passed by the executing Court rejecting the application of the petitioners herein. The application that came to be rejected was under Order 21, R.89 of the Code of Civil Procedure for setting aside the sale of the agricultural land belonging to the petitioners on depositing the sale amount and 5 per cent of the purchase money.

I have heard Mr.C.C.Kamdar, learned Advocate appearing for the petitioners, and Mr.S.M.Shah, for the respondents No.1/1 to 1/3. Mr.Mehul S.Shah, learned Advocate appearing for the respondent No.3, adopted the arguments of Mr.S.M.Shah.

Before I consider the merits and the law points involved in the Civil Revision Application, the preliminary objections raised by Mr.S.M.Shah for the respondents are necessary to be dealt with and disposed of. In order to appreciate and deal with the objections raised by Mr.Shah, it is necessary to note the relevant facts giving rise to the present revision application. The facts are as under:-

The deceased, Bhupatsing Jivabhai Barad, had instituted a civil suit No.118 of 1973 against Bava Devraj, respondent No.2 herein, for recovery of his dues in the Court of Civil Judge (J.D.) at Jetpur. The said suit was decreed. The judgment creditor thereupon filed Execution Application, being Regular Darkhast No.5/77 in the Court of the Civil Judge (J.D.) at Jetpur and got the agricultural land bearing Survey No.79 Paiki measuring Acres 17-Gunthas 10, under attachment in execution of the decree against the judgment-debtor Bava Devraj, respondent No.2 herein.

The petitioner No.1 is the wife of the judgment-debtor, Bava Devraj, and the petitioners Nos. 2 to 5 are his sons. Petitioners Nos. 2 to 5 were minors at the relevant time. The applicants, the family members of the judgment-debtor, on knowing about the attachment

of their agricultural land in execution proceedings, preferred application under Order 21, R.58 of the Code of Civil Procedure, 1908 for raising the attachment contending, inter alia, that the land in question was ancestral property and the petitioners were the coparceners. It was also contended by the petitioners that the judgment-debtor-respondent No.2 had released his share by a registered sale deed dated 21.7.1977 at Exh.79 and the decree passed against the respondent No.2 was not executable against the property belonging to the petitioners. It was also contended by the petitioners that the debt contracted by the respondent No.2 was because of his gambling habit and as such was tainted with immorality and that there was no legal necessity for the family requirement and as such the petitioners Nos.2 to 5 as his sons were not liable to discharge the said liability on the doctrine of pious duty of the sons to pay up father's debt. Wife of the judgment-debtor was an illiterate village house-wife and the petitioners Nos. 2 to 5 were all minors.

The said application under Order 21, R.58 was contested by the respondent No.1. The trial Court, after recording and examining the evidence, concluded that the property in question was ancestral and the petitioners are coparceners in the said agricultural land and that the judgment-debtor had got right to relinquish his share. The trial Court, however, negatived the issue regarding debt being for immoral purpose and ultimately dismissed the objection-application Exh.38.

The petitioners preferred appeal against the said order of dismissal of the application Exh.38. The appellate Court, however, dismissed the appeal on 30.1.1982. The petitioners thereupon preferred Civil Revision Application No.684/82 before this High Court. The High Court did not interfere with the findings of the Court below and dismissed the application observing that when the appeal was pending, the appellate court had granted stay of the confirmation of the sale and the sale was not confirmed yet and the High Court, therefore, extended the stay till 2.10.1982.

The petitioners having direct interest in the agricultural land in question, preferred the application Exh.124, purporting to be under Order 21, R.89 of the Code of Civil Procedure, on 20.10.1982. By the said

application, Exh.124, the petitioners contended that the petitioners deposited Rs.18,065/- for payment to the decree holder on 29.4.1982. The petitioners also deposited Rs.1535/-, being a sum equivalent to 5% of the purchase money for the purpose of payment to the purchaser.

It may be stated at this stage that in the aforesaid execution proceedings, the sale of the agricultural land in question was held and the respondent No.3 was the highest bidder to purchase the said land. By the said application Exh.124, the petitioners prayed that the order to sell by auction the land in question be set aside. The amount of Rs.1,535/-, being a sum equivalent to 5% of the purchase money be ordered to be paid to purchaser-respondent No.3 and that the decretal amount that was deposited by the appellant be ordered to be paid to the judgment-creditor. The petitioners also undertook to pay and deposit any further amount payable by them. The petitioners also requested the executing Court to pass necessary order to the effect that the decree under execution was satisfied.

The learned Judge of the executing Court, without considering the provisions of Order 21, Rules 85, 86, 87 and 89 of the Code of Civil Procedure in their proper perspective, ordered to reject the application holding, inter alia, that the application was submitted to prolong the matter anyhow and to harass the judgment-creditor. The learned Judge of the executing Court passed the said order below application Exh.124 on 31.1.1984.

Respondent No.3, who had given the highest offer at the time of auction of the aforesaid agricultural land, submitted his written arguments at Exh.150 contending, inter alia, that the observations of the High Court in the earlier proceedings in respect of the applications under Order 21, R.58 of the Code of Civil Procedure in regard to the confirmation of the sale were wrong and it is not binding to the executing court, as the subject-matter of the revision application was not about the sale. It was also requested by the respondent No.3 to confirm the sale at that stage, if it was concluded by the executing court that the same was not so confirmed.

It is an admitted position on the record that the respondent No.3 did not deposit 25% of the amount of the purchase-money of the agricultural land in question at the time of auction. It is the case of the respondent No.3 that the trial Court had directed him to pay the said amount of 25%, as and when he was directed so to pay. However, it transpires from the record that the executing Court had passed the order on 14.9.1978 below application Exh.42 preferred by the petitioners herein to stay the attachment and execution proceedings. The said order dated 14.9.1978 on translation would read as under:-

"The last offer of Rs.30,700/- of the auction-purchaser Shri Ramniklal Revashankar Mehta, resident of Vadia is accepted. He will be informed whether the suit land is to sold or not to him, after disposal of the application Exh.42 and if the suit field is to be sold to him, he will have to deposit 25 per cent of the purchase money within 10 days from the date of such communication to him and the balance amount will have to be paid within 15 days thereafter."

There is nothing on the record, nor it has been pointed out by Mr.S.M.Shah, learned Advocate for the respondents, that the offer of the respondent No.3 was accepted finally by the executing court at any point of time and that the sale was confirmed in accordance with the provisions of Order 21, R.92 of the Code of Civil Procedure.

Resuming factual aspect, the petitioners being aggrieved by the aforesaid order dated 31.1.1984, preferred the Regular Civil Appeal No.24/84 in the Court of the Extra Assistant Judge, Rajkot District at Gondal, who by his judgment and order dated 30.10.1996, dismissed the appeal. The learned Judge, while dismissing the appeal observed: "It is admitted that the purchaser has not deposited 1/4th amount immediately and full amount within 15 days from the sale but it is not the fault of the purchaser and purchaser is not defaulter." The learned Judge, having relied on the decision in the case of RAMANLAL NAGINDAS JARIWALA v. STATE BANK OF INDIA, UDHNA & ORS., reported in 1983(1) G.L.R. page 313, held that the provisions of Order 21, Rule 84 as well as Rule 85 of the Civil Procedure Code are mandatory in the sense that in the event of the auction purchaser failing to

deposit the full purchase price within 15 days from the date of the auction sale, the court will have no option but to order a resale of the property. In the peculiar facts of that case which presented a unique picture and inspite of the objection having been raised on behalf of the auction purchaser stayed not only the further proceeding, but also the deposit of the 3/4th remainder amount of consideration and therefore this action of the Court taken in the face of the opposition by the auction purchaser cannot now go to the detriment of the auction purchaser so as to upset the whole auction sale. The point was whether the Court's staying of even the deposit of the remainder of the purchase price by the auction purchaser can go to mitigate the rigorous of provisions of Order 21, Rule 84 and 85 of the Code. In these peculiar facts and circumstances of the case, the High Court held that the word "default" implied a volitional and deliberate act and if a man for no fault of his is not able to deposit the amount required to be deposited under Order 21 Rules 85 and 86 of the Code, he cannot be said to have been within the sweep of a mandatory provision of Order 21 Rules 84 and 85 of the Code. It is truism to state that wrong assumption of law and thereby consequential non-deposit of or negligence of being ready with the money latest on the 15th day, would be covered by the term "default". This Court, therefore, concluded in the above case of Ramanlal Nagindas Jariwala (supra) that the provisions of Order 21, Rules 84 as well as 85 of the Civil Procedure Code regarding deposit of full purchase auction price are mandatory and such mandatory provisions imply that the Court has no jurisdiction to extend the period for payment of balance. However, in that case, the purchaser willing to pay up the amount but the High Court staying deposit of the remainder of the purchase price, cannot be treated as a default of the auction-purchaser, nor it can be said to have come within the mandatory provisions of Order 21, Rules 84 and 85. It was held that there was, therefore, no default on the part of the auction-purchaser, as he was prevented from depositing the amount for reasons totally beyond his control and that the court's suo motu action cannot go to the detriment of the citizen and no one can be allowed to suffer because of court's order.

Relying upon the aforesaid observations and the ratio, the appellate Court dismissed the appeal of the petitioners herein.

It may be mentioned at this stage that the petitioners had earlier preferred the appeal, being Appeal No.24/84, in the Court of the Extra Assistant Judge, Rajkot District at Gondal, against the aforesaid order of dismissal of application Exh.124 raising various points relating to confirmation of the sale, deposit of requisite amount as per the provisions of Order 21, Rules 84,85,86 and 89. However, when the appeal came up for hearing before the appellate Court, the respondent raised preliminary objection as to maintainability of the appeal under Order 43 of the Code of Civil Procedure and that the appellate Court agreeing with the submission dismissed the appeal as not maintainable by its judgment and order dated 25.7.1994. The petitioners challenged the said order of dismissal of the appeal by filing Revision Application No.26 of 1995 before this High Court, who after hearing the parties, was pleased to allow the revision application by reversing the judgment of the appellate court and remanded the matter to the appellate court by its judgment and order dated February 13, 1995, and that after the remand, the Appeal No.24 of 1984 came to be reheard and the aforesaid judgment and order were rendered by the Extra Assistant Judge at Gondal.

When the present revision application was preferred, this Court (R.R.Jain,J. (as he was then)) ordered to issue notice, on 13.2.1997 and granted ad interim relief in terms of para 10(B). Mr.S.M.Shah appeared for respondents Nos.1/1 to 1/3, who are the heirs of the original judgment-creditor, Bhupatsing Jivabhai Barad, who died during the pendency of the proceedings. The matter was adjourned from time to time at the request of the learned Advocates for the parties. On 24.6.1997, the matter was called out twice or thrice and Mr.S.M.Shah for respondents Nos.1/1 to 1/3 was not present and eventually the matter was heard in his absence by passing the following order:

"Rule. Interim relief to continue."

Mr.S.M.Shah thereafter appeared and insisted to be heard stating that the matter could have been dismissed in limine. However, the following order was passed on the same day, i.e. 24.6.1997:-

"After passing of the aforesaid order, Mr.Shah has appeared and requested for hearing on the matter. Instead, the matter is ordered to be fixed for final hearing on 8th July,1997.

Accordingly, Rule is made returnable on 8th July,1997. Mr.S.M.Shah waives service of Rule for all the respondents.

Interim relief as ordered will continue."

Thereafter, the matter was heard quite at length somewhere in the second week of July. It was noticed during the course of the final hearing that the auction purchaser of the suit land was not joined as one of the parties in the revision application. Mr.Kamdar, for the petitioners, therefore, sought time to join the auction purchaser as party, as he would be an interested party in the final outcome of the proceedings. Civil Application No.7163/97 was eventually submitted for joining Shri Ramniklal Revashankar Mehta, the auction purchaser as respondent No.3 in the present revision application. Mr.S.M.Shah opposed the said application tooth and nail. He cited several authorities contending that the proposed respondent No.3 cannot now be joined as party, and relied upon Order 41, R.20(2) of the Code of Civil Procedure,1908. This Court dealing with all the submissions of Mr.Shah and the authorities cited by him, granted the application allowing the respondent No.3 to be impleaded as party-respondent in the present Civil Revision Application.

The said application for impleading the respondent No.3 having been allowed, this Court passed the following order on 1.10.1997:-

"In view of the order passed in C.a.No.7163/97, rule to issue to newly added party-respondent, Shri Ramniklal Revsahankar Mehta, Bazar, Vadia, Dist.Amreli, returnable on 14.10.1997.

Learned Advocate appearing for the petitioners to make necessary amendment in the memo of CRA by adding respondent No.3 as party-respondent.

Since the matter is part-heard, the CRA to be placed for



hearing before this Court on 14.10.97."

The present petition was thereupon placed on several occasions for final hearing, i.e. on 16.10.1997, 21.10.1997, 23.10.1997, 10.11.1997, 18.11.1997 and 19.11.1997. However, the matter could not be taken up at the request of the learned Advocates appearing for the parties and/or as the Court was busy in other part-heard matters.

When the matter was taken up for final hearing on 19.11.1997, the learned Advocate for the respondent No.3 raised the preliminary objection in writing to the effect that the matter was not heard after the order of joining the respondent No.3 as party and therefore respondent No.3 submitted that the revision application should be ordered to be placed before the appropriate Bench, as this Court was not assigned the work of Civil Revision Application. This preliminary objection is required to be rejected, as this Court has been directed to complete the part-heard matters and no other work is assigned to this Court. The cause in the matter dates back to 1973. The executing proceedings that were held in the year 1978 are stayed on account of the present proceedings. Therefore, the preliminary objection being without substance is stated to be rejected.

Mr.S.M.Shah, learned Advocate for the respondents Nos. 1/1 to 1/3, while raising the aforesaid preliminary objection, was curt in his conduct stating that he is preventing the Court from hearing the matter. All such bizarre behaviour of Mr.S.M.Shah is not in good taste and therefore it is not recorded in detail. Suffice it to say that the Court has to discharge its duty without any fear or favour and affection or ill-will. It became necessary for the Court, time and again, to request Mr.S.M.Shah to maintain discipline and decorum of the Court while arguing the matter. He also interrupted, time and again, during the course of arguments of Mr.Kamdar, learned Advocate for the petitioners.

Now, coming to the merits of the case and the law points that are raised by the learned Advocates for the parties, Mr.Kamdar, for the petitioners, submitted that the auction of the suit agricultural land was held on 14.11.1978 and the final bid of the respondent No.3 was

made for Rs.30,700/- of which 5% has since been deposited by the applicants in compliance with Rule 89(1)(a) of Order 21 and the decretal amount as specified in the proclamation of sale has also been deposited by the applicants for the payment of the decree-holder. In submission of Mr.Kamdar, the petitioners having thus complied with all the requirements of Rule 89 of Order 21 of the Code, the executing Court should not have dismissed the application of the applicants for setting aside sale on deposit. As against this, Mr.S.M.Shah, for the respondents Nos.1/1 to 1/3, submitted that the applicants were not the judgment-debtors and as such they are not competent to prefer such application under Order 21, R.89 of the Code and that the application was not for setting aside the sale of the agricultural lands in question. R.89 of Order 21 of the Code provides as under:-

"89. Application to set aside sale on deposit.(1)

Where immovable property has been sold in execution of a decree, any person claiming an interest in the property sold at the time of the sale or at the time of making the application, or acting for or in the interest of such person, may apply to have the sale set aside on his depositing in Court:-

(a) for payment to the purchaser, a sum equal to five percent of the purchase-money, and]

(b) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

(2) Where a person applies under Rule 90 to set aside the sale of the immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.]

(3) Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale."

On plain reading of the aforesaid provisions of Rule 89, any person claiming interest in the property

sold at the time of the sale or at the time of making the application or acting for or in the interest of such persons can apply to have the sale set aside on depositing the amount as set out hereinabove. The submission of Mr.S.M.Shah that the petitioners were not the judgment-debtors and therefore were incompetent to prefer the application cannot be accepted. The lower Court, after examining the evidence, has clearly held that the property is ancestral and the petitioners are coparceners and that the respondent No.2 had right to relinquish his share. It, therefore, clearly transpires from the record that the petitioners are dependent upon the suit agricultural land and the said land belonging to the family, the applicants were obviously interested in the property.

It also transpires from the record that the Courts below have clearly omitted to read and/or misread the material aspect of the record, while holding that the respondent No.3 was permitted to withhold payment of 25 per cent of the sale price as provided in Order 21, R.84 of the Code. As observed hereinabove, the last or the highest bid of the respondent No.3 was not accepted on account of the pending application of the petitioners at Exh.42. The respondent No.3, auction purchaser, was, therefore, directed that he would be informed whether the land is to be sold to him or not on disposal of the application Exh.42 and that on disposal of the application Exh.42 if the agricultural land is decided to be sold to the respondent No.3, he would be required to pay 1/4th price amount within ten days of such intimation and remainder amount within fifteen days therefrom. Thus, the last of final bid of respondent No.3 was not accepted. The finding recorded by the court below that on acceptance of the offer of the respondent No.3, he was granted time to pay up 25 per cent of the price is clear misreading of the records. The question as to default in payment of 25 per cent of the payment does not arise at all, in the facts and circumstances of the case. There is nothing on the record to suggest that thereafter the executing court finally accepted the bid of the respondent No.3. Mr.S.M.Shah, for the respondents Nos.1/1 to 1/3 has not been able to show from record as to whether such final bid offer was accepted by the executing court.

Mr.Kamdar then submitted that the sale was not confirmed by the executing Court and before that the petitioners had deposited the requisite amount as

contemplated under above Rule 89. In this connection, Mr.Shah has relied on the application of the respondent No.3 dated 8/11.2.1982 at Exh.118 in the aforesaid execution proceedings No.5/77 and the order passed below that application. On basis of this application, Mr.Shah submits that the sale was confirmed. The application Exh.118 of the respondent No.3 reads that the respondent No.3 made the last offer of Rs.30,700/- on 14.9.1978 in the auction in respect of the sale of the suit agricultural land, bearing Survey No.79, admeasuring 17 acres, 10 gunthas. The said application also recites that the petitioners had preferred application Exh.38 to vacate the attachment on the suit land. By application Exh.42, stay against the execution proceedings was sought. The aforesaid order dated 14.9.1978 passed below the said application Exh.42 is clearly recited in this application Exh.118 to the effect that it was not decided to sell the agricultural land to the respondent No.3 and would only be decided on disposal of application Exh.42 and that he would be directed to deposit 1/4th amount of purchase price within ten days from such direction. Thus, it clearly transpires that his bid was not finally accepted. The respondent No.3 has also stated in his application Exh.118 that he had directly gathered that Misc.Civil Appeal No.8/80 was disposed of on 30.1.1982 and therefore he has made this application along with Rs30,700/- which was requested to be accepted as sale price of the land. The respondent No.3 also requested for issue of necessary sale certificates under Rule 94 of Order 21 of the Code and that he would submit necessary stamp papers on passing of such order.

The learned Judge of the executing Court by his order dated 11.2.1982 ordered to issue notice to the other side returnable on 18.2.1982. There is nothing on the record to show whether the notice was issued and served on the other side and the other side was heard thereafter. The executing Court, namely, the Civil Judge (J.D.),, Jetpur, passed the following order on 18.2.1982 below the said application Exh.118:-

"Recd. the application & heard. Hereby I order to Nazir to accept Rs.30,700/- under due receipt and sale certificate be issued subject to production of non-judicial stamp within two months. No order as to costs."

The aforesaid order of the executing court dated 18.2.1982 does not refer to if the notice was issued and/or served on the other side. There is nothing in the order that the other side was heard at all and what was the contentions raised by or on behalf of the applicants. It appears that the executing court directed to accept Rs.30,700/- in disregard to the record, inasmuch as the final bid of the respondent No.3 was not accepted at any point of time. As ordered, the non-judicious stamp paper which had to be submitted within two months have since not been tendered by the respondent No.3 nor any sale certificate is issued so far. Anyway, Mr.S.M.Shah is not in a position to make any statement in this regard. What is contended by Mr.Shah is that this Court cannot go behind the confirmation of the sale. There is, however, no confirmation of the sale in respect to the land in question and therefore there is no question of going behind it.

Rule 92 of Order 21 of the Code provides about the sale when to become absolute or be set aside. There is a proviso in the said rule to the effect that no order shall be made unless notice of the application has been given to all persons affected therein. As pointed out hereinabove, no notice was served on the applicants, though it was so ordered, nor the applicants were heard before accepting Rs.30,700/- as tendered by the respondent No.3. There is, therefore, no confirmation of sale. Simply because the respondent No.3 tendered the amount of his final bid, being Rs.30,700/- it cannot be concluded that the sale was accepted, contrary to the order dated 14.9.1978 passed below application Exh.42. The records reveal that the notice was not served on the applicants or the judgment-debtor and therefore the sale cannot be said to have become absolute under Rule 92 of Order 21 of the Code.

Rule 94 of Order 21 of the Code provides that where a sale of immovable property has become absolute, the Court shall grant a certificate certifying the property sold and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear date the day on which the sale became absolute. There is nothing on the record to suggest that the sale in the instant case has become absolute as required under Rules 92 and 94 of Order 21. It is, therefore, required to be held that the executing

Court and the lower appellate Court have totally brushed aside the relevant aspect of the record and misconstrued the aspect of having not committed default by respondent No.3 at the court's instance. The courts below failed to exercise jurisdiction in omitting to consider the provisions of Rules 84,85,86,89,92 and 94 of Order 21 of the Code. Records reveal that the bid of respondent No.3 was finally to be accepted on disposal of Exh.42. Simply because the amount tendered by the respondent No.3 was accepted by the executing court, in disregard to the relevant provisions of the rules, it cannot be gainsaid that the sale was made absolute or final.

Mr. Shah submitted that the question of default as has been held by this Court in case of Ramanlal Nagindas Zariwala (supra) has got to be accepted by me and if I am to take other view, the matter was required to be referred to the larger Bench. Mr. Shah relied on the case of Somabhai Mathurbhai Patel v. New Shorrock Mills, 1983 G.L.R. page 273 in this connection. The Supreme Court held in that case that it is not open to a Single Judge to reject the ratio of the decision of another Single Judge of the same High Court by merely saying that attention of that Single Judge was not invited to the decision of Supreme Court which may have an impact on the point under examination. Every authority is to be applied on given facts of the case. In the instant case, the question as to default does not arise while the final bid of the respondent No.3 was not accepted and therefore the aforesaid decision in case of Somabhai Mathurbhai Patel (supra) cannot be said to be applicable, in the facts and circumstances of the present case. Therefore, there is no question of taking other view of the matter.

Mr. S.M. Shah then contended that the revision application as filed by the applicants is incompetent. In support of his submission, Mr. Shah relied upon section 211 of the Bombay Land Revenue Code providing for power of State Government, certain revenue officers to call for and examine records and proceedings of subordinate officers and insisted that this court should have also called for records and proceedings before hearing the matter finally. Section 115 of the Code of Civil Procedure in respect of revisional powers of High Court cannot be equated with the revisional powers of the State Government as provided in the Bombay Land Revenue Code. There is nothing in sec.115 of the Code of Civil Procedure that for want of record and proceedings, the

revision application would be rendered incompetent. In this connection, Mr.S.M.Shah has also relied on several decisions reported in AIR 1996 SC page 439; 34(1) G.L.R. page 206; 23(2) G.L.R. page 676 and 14 G.L.R. page 617. I have gone through all these judgments which were simply referred to by Mr.Shah. In the facts and circumstances of the present case, in my view, the decision relied on by Mr.Shah are not applicable in this case. It is well settled that the High Court has revisional powers, when the Court below has failed to exercise the jurisdiction vested in it or has exercised the jurisdiction not vested in it by law. In facts of the case, the Courts below have under a misapprehension of the law or an erroneous construction of rules 84,85,86 and 89 of Order 21 of the Code of Civil Procedure, 1908 did not consider the applications under Order 21, R.89 of the Code on misconception of prolonging the matter and misreading the factual aspect as regards default. The erroneous dismissal of the application without considering and appreciating the provisions of Order 21, R.89 of the Code on the ground that the application was submitted to prolong the matter, on failure to exercise jurisdiction. In the present case, the petitioners deposited the amount as stated in the sale proclamation together with the 5 per cent of the purchase money and refusal to set aside the auction proceedings and the so-called resultant sale would amount to irregular exercise of jurisdiction, particularly when the sale was not made absolute under Rule 92 of Order 21. The courts below, in disregard to the factual aspect and provisions of the above relevant rules of Order 21, failed to exercise jurisdiction vested by law. Besides, the court below failed to consider that no notice as required under the rules was served on the other side' and no hearing was offered. The impugned orders are, therefore, bad in law and deserves to be quashed and set aside. The hearing as contemplated under Rule 105 of Order 21 was also not afforded to the petitioners before allowing the respondent No.3 to deposit the auction price after four years from the date of the auction and that too without accepting the bid finally. From what is stated hereinabove, it is abundantly clear that the sale was not made absolute by the executing Court. The executing Court should have considered the application under Order 21, R.89 according to law. Under these facts and circumstances of the case, the submission of Mr.S.M.Shah that the revision application is incompetent cannot be accepted.

It was then argued by Mr.S.M.Shah that respondent

No.3 should not have been joined as party-respondent in the present petition. Civil Application No.7163/97 for joining the respondent No.3 as party respondent, was heard at length and disposed of on 13.9.1997. When the issue has thus been determined, the respondents cannot be allowed to re-agitate the same issue again.

Mr.S.M.Shah also raised the contention that the Court cannot travel beyond the pleadings stating that there is no prayer for setting aside the sale by the petitioners. It is not correct, inasmuch as the prayer-clause 6(1) of the application Exh.124 clearly reads that the land of survey No.79 admeasuring A-17,Gunthas 10 at Thana Galol village which is sold by auction be set aside. Mr.S.M.Shah then submitted that the respondent No.3 was not joined at the appellate stage and as such the decree has become final, so far as respondent No.3 is concerned. Mr.Shah, in support of his submission, relied on the decision in case of Rajeswari Amma and another vs. Joseph and another, AIR 1995 Supreme Court 719. In that case, the executing Court ordered delivery of possession of property in favour of decree-holders and the property was divided between decree-holders.Judgment debtor preferred revision against that order and in that the decree-holder impleaded all but one decree-holder. The revisional Court cannot set aside order of execution court which was common, inseparable and has become final against the decree-holder who was not joined in revision. In my opinion, in the facts and circumstances of the case, the decision will not be applicable, as the respondent No.3 is not decree-holder nor it has become final or inseparable qua the respondent No.3. Respondent No.3 was a party before the executing Court. He was also sought to be joined as party in the appellate Court, as is observed in the judgment rendered in the aforesaid civil application. Respondent No.3 is also a party-respondent in the present proceedings of the revision application. In that view of the matter, the decision relied on by Mr.Shah cannot be applicable to the present case.

Mr.S.M.Shah then relied on the case of Shri Bakshish Singh (dead) by Lrds. v. Arjan Singh & Ors., reported in JT 1996 (3) S.C.565, and the case of Satguru Sharan Shrivastava v. Dwarka Prasad Mathur (Dead) through Lrs., reported in JT 1996(7) S.C. 460. Both these judgments deal with the decree which is indivisible and inseparable. There cannot be inconsistent decree as



against the deceased-respondent and contesting surviving respondent. In Satguru Sharan Shrivastava's case (supra), the Supreme Court held that Order 22 R4(4) as amended in 1976 would not be applicable when on being told about the death of first defendant, the Counsel requested for deleting her name and same was allowed. The effect would be that decree against first defendant had become final. In the facts of the present case, the decision will not be applicable for the reason that no decree is passed in favour of third respondent and as such there is no question of decree being inseparable or final. The right of the respondent No.3 as the auction purchaser is to be regulated and regarded, having regard to the relevant provisions of Order 21 of the Code of Civil Procedure. The doctrine as to inseparability for finalisation of the decree cannot be invoked in facts of the case. The submissions of Mr. S.M.Shah in this regard are, therefore, liable to be rejected and are hereby rejected.

Mr.Kamdar has also placed reliance on several authorities laying down that the provisions of Order 21, R.84 of the Code are mandatory. There is no dispute about it. The requirement as to deposit of 25 per cent of the purchase price on acceptance of the final bid is mandatory. In the present case, the bid of the respondent No.3 was not finally accepted, pending application Exh.42. Therefore, there was no question of default. The submission of Mr.S.M.Shah that the lower Court has not examined the factual aspect of default is also irrelevant, for the reason that in the absence of the bid having been finally accepted, the question as to default did not arise.

Mr.Kamdar also invited my attention to the case of Mst.Phula Wanti and others v. Kashmiri Lal, reported in AIR 1956 Pepsu page 17, wherein section 22 of the Limitation Act was dealt with. It was held that when a person is added as a party on an application made for the purpose, his addition is deemed to take effect from the date of the presentation of the application and the order when passed should be deemed to have been made at the date on which the jurisdiction of the Court is properly invoked. There cannot be any dispute with regard to this proposition of law, and it squarely applies to the facts and circumstances of the case.

Mr.S.M.Shah made a faint attempt to contend that the application Exh.124 is beyond the period of limitation. He, however, did not refer to relevant or any provision of the Limitation Act or of the Code. Nor did he point out as to how the application is time-barred. The period of limitation for making deposit preceding application for setting aside sale under Rule 89 is 30 days from the date of the sale under Rule 92(2); while that for making subsequent application under Rule 89 is 60 days from the date of sale under Art.127 of the Limitation Act 1963 (as substituted by Amending Act 104 of 1976). Order 21, Rule 92(2) and Article 127 of the Limitation Act operate in different fields and there is no repugnancy between these provisions. In the present case, the applicants deposited the amount on 29.4.1982, the application under Rule 89 was made on 20.10.1982. As observed hereinabove, there is no formal or final sale in favour of the respondent No.3. It is, therefore, not understood nor it is pointed out as to how in facts of the case either of above provision relating to Limitation is attracted. I, therefore, reject the contention of Shri Shah regarding the limitation.

In the above view of the matter, the revision application succeeds. The rule is accordingly made absolute with costs. The impugned orders passed by the executing Court below application Exh.124 on 31.1.1984 confirmed by the appellate Court on 30.10.1986 in Regular Civil Appeal No.24/84 are hereby quashed and set aside. The application Exh.124 before the executing Court stands granted. The final bid of the respondent No.3 in respect of sale of the agricultural lands in question is set aside. The executing Court is directed to repay the purchase money deposited by the respondent No.3 with the accrued interest thereon. The decretal amount deposited by the applicants be paid to the decree-holder and on such payment, the decree shall stand satisfied.

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On pronouncement of the judgment and order, Mr.S.M.Shah, for the respondents Nos.1/2 to 1/3, and Mr.Mehul S.Shah, for the respondent No.3, pray for grant of stay as to operation of the order passed by this Court so as to enable the concerned respondents to approach the Hon'ble Supreme Court by way of Special Leave Petition. Mr.Kamdar is heard. He objects to grant of stay of the order.

In the facts of the case, the order shall stand stayed for a period of six weeks from today.

Dt.27.11.1997 (D.G.Karia,J.)

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